

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK**

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**UTICA MUTUAL INSURANCE COMPANY,**

**Plaintiff,**

**v.**

**6:12-CV-00196 (BKS/ATB)**

**MUNICH REINSURANCE AMERICA, INC.,**

**Defendant.**

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**MUNICH REINSURANCE AMERICA, INC.,**

**Plaintiff,**

**v.**

**6: 13-CV-00743 (BKS/ATB)**

**UTICA MUTUAL INSURANCE COMPANY,**

**Defendant.**

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**Appearances:**

Syed S. Ahmad  
Hunton & Williams LLP  
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For Utica Mutual Insurance Company

Bruce M. Friedman  
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For Munich Reinsurance America, Inc.

**Hon. Brenda K. Sannes, United States District Judge:**

**MEMORANDUM-DECISION AND ORDER**

## I. INTRODUCTION

These related breach of contract actions arise from Utica Mutual Insurance Company's ("Utica") attempts to seek reimbursement from Munich Reinsurance America, Inc. ("Munich Re") under reinsurance contracts Munich Re issued to Utica in 1973 (6:12-cv-196) and 1977 (6:13-cv-743). United States Magistrate Judge Andrew T. Baxter has closely supervised the lengthy and complex discovery process in these cases.<sup>1</sup> In September 2015, Munich Re moved to compel Utica to produce the handwritten notes Utica had redacted, asserting attorney-client privilege, from "Document 125" on the grounds that the notes were not privileged and that they were subject to the crime-fraud exception. Dkt. No. 85. On January 21, 2016, Magistrate Judge Baxter upheld Utica's assertion of privilege, found that the crime-fraud exception did not apply, and denied Munich Re's motion. Dkt. No. 138. On April 11, 2016, Munich Re filed a letter brief requesting, *inter alia*, reconsideration of its motion to compel production of Document 125. Dkt. No. 153. On April 25, 2016, Magistrate Judge Baxter denied Munich Re's motion. Dkt. No. 175. Presently before the Court is Munich Re's appeal of Magistrate Judge Baxter's denial of its motion for reconsideration. Dkt. No. 177.

## II. BACKGROUND

In the 1970s, Utica sold primary and umbrella insurance policies to Goulds Pumps, Inc. ("Goulds"). Dkt. No. 1, ¶ 9; 6:13-cv-743, Dkt. No. 1, ¶¶ 6-8. Utica and Munich Re entered into reinsurance<sup>2</sup> agreements that reinsured the 1973 and 1977 Goulds umbrella policies. Dkt. No. 1,

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<sup>1</sup> As many of the discovery issues and motions were identical, Magistrate Judge Baxter consolidated several discovery hearings and orders, including the orders from which Munich Re appeals. Unless otherwise specified, docket citations are to the filings in 6:12-cv-196.

<sup>2</sup> Utica describes reinsurance "as insurance for insurance companies." Dkt. No. 185, p. 7 n.1.

¶ 10; 6:13-cv-743, Dkt. No. 1, ¶ 11. According to Utica, “[t]ens of thousands of individuals . . . asserted, and continue to assert, claims against Goulds alleging injury from asbestos.” Dkt. No. 1, ¶ 12. Goulds initially sought, and Utica provided, coverage for these claims under the primary policies. Dkt. No. 185, p. 8. After the primary policies were exhausted, Utica began to defend Goulds and settle “claims under the relevant umbrella policies.” *Id.* In 2007, after disagreeing about the scope of insurance available, Utica and Goulds executed a settlement agreement. *Id.* at p. 9.

In 2007, “Utica started to bill Munich Re . . . based on the terms of the reinsurance contracts . . . and the terms of the 1973 and 1977 [Goulds] umbrella policies [that] Munich Re reinsured.” *Id.* Specifically, Utica sought payment for \$7.8 million in loss payments and associated expense payments under the 1973 reinsurance contract and \$1.7 million in loss and associated expense payments under the 1977 reinsurance contract. *Id.* at p. 10.

In 2012, Utica filed a complaint alleging that Munich Re breached the 1973 reinsurance agreement by failing to pay outstanding billings in the amount of \$3,283,304.55. Dkt. No. 1. In 2013, Munich Re filed a complaint alleging that, by paying Utica \$1,789,813.47 under the 1977 reinsurance agreement, it has “paid more than its limit of liability” and that Utica breached the reinsurance agreement by “refusing to refund . . . the amount of \$789,813.47 which Munich Re overpaid.” 6:13-cv-743, Dkt. No. 1, p. 6.

Although there are “many issues in dispute in the instant actions,” the issue relevant to this appeal is Munich Re’s contention that “Utica strategically orchestrated a settlement structure with [Goulds] for the sole purpose of either creating reinsurance coverage which did not exist or maximizing a reinsurance recovery to which, in good faith, Utica is not entitled.” Dkt. No. 177-

1, p. 2 (emphasis omitted). Document 125, which the Court has reviewed *ex parte* and *in camera*,<sup>3</sup> is a draft mediation statement with handwritten notes that Utica claims were authored by an attorney from the law firm that represented it during the Goulds litigation. Munich Re contends that the redacted notes contain evidence of Utica's allegedly fraudulent attempt to bill under the 1973 and 1977 reinsurance agreements. Dkt. No. 177-1, p. 5.

### III. DISCUSSION

Munich Re argues that Magistrate Judge Baxter's finding that the notes on Document 125 were protected by the attorney-client privilege was clearly erroneous and that Magistrate Judge Baxter misapplied the crime-fraud exception. Dkt. No. 177-1, p. 6. The Court's review of a non-dispositive discovery order is limited to determining whether the order is "clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a); 28 U.S.C. § 636(b)(1)(A). "Under this highly deferential standard, magistrate judges are 'afforded broad discretion in resolving discovery disputes, and reversal is appropriate only if that discretion is abused.'" *Storms v. United States*, No. 13-CV-0811 (MKB), 2014 WL 3547016, at \*4, 2014 U.S. Dist. LEXIS 96665, at \*15 (E.D.N.Y. July 16, 2014) (citation omitted).

According to Munich Re, "Utica originally produced [Document 125] with only one handwritten note redacted from the first page" but then "clawed it back and produced a different version . . . with an additional redaction on the first page," asserting attorney-client privilege. Dkt. No. 177-1, p. 5, n.2; Dkt. No. 85-1, p. 24. Utica explained the clawback as follows:

[Utica] identified the document on its log as containing redactions of privileged information. The document was then inadvertently made available without any

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<sup>3</sup> Utica is reminded of its obligation to retain a copy of Document 125 in its possession in the event it is required in subsequent proceedings.

redactions. Once Utica learned of this, it immediately contacted Munich Re and provided Munich Re with the document with the appropriate redactions. Munich Re agreed to destroy any unredacted copies of the document.

Dkt. No. 103, p. 31, n.23.

In September 2015, Munich Re moved to compel, among other things, Document 125 as originally produced (i.e., with one redaction), arguing that the attorney-client privilege did not apply and that even if it did, because the notes were made in furtherance of Utica's attempt to defraud its reinsurers, they fell within the crime-fraud exception. Dkt. No. 85-1, pp. 26-27. Utica opposed the motion, maintaining that the notes it redacted were privileged. Dkt. No. 103, p. 7. Utica also argued that because Munich Re provided "only generalizations about the alleged fraud" and failed to show "that Utica knew that any alleged representation that the primary policies were subject to products aggregate limits was false" or that the communication or work product "in question was itself in furtherance of the crime or fraud," it failed to establish that the notes fell within the crime-fraud exception. *Id.* at 28, n.19 (citing *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995)).

Magistrate Judge Baxter issued a text order on October 11, 2015 directing Utica to submit "unredacted copies of the documents as to which Munich Re objected to Utica Mutual's invocation of privilege" for *ex parte, in camera* review. Dkt. No. 111. On October 26, 2015, Utica provided Magistrate Judge Baxter with the unredacted documents, along with a cover letter in which it stated that "Utica redacted handwritten notes made by Rivkin Radler attorneys, Utica's outside counsel" from Document 125. Dkt. No. 177-1, p. 10.

On October 27, 2015, Magistrate Judge Baxter held a telephonic motion hearing on Munich Re's motion to compel. Text Minute Entry, October 27, 2015. Magistrate Judge Baxter

“deferred decision on that portion of Munich Re’s motion to compel which challenged Utica Mutual’s invocation of privilege with respect to certain documents” pending *in camera* review. Dkt. No. 114, p. 5.

On January 20, 2016, Magistrate Judge Baxter held oral argument concerning, among other things, Munich Re’s motion to compel production of Document 125. Dkt. No. 143. Magistrate Judge Baxter reviewed the attorney-client privilege standard and applicable Second Circuit case law extensively, including the showing required to invoke the attorney-client privilege, the application of the attorney-client privilege in the context of in-house corporate counsel, and the attorney work product doctrine. *See* Dkt. No. 143, pp. 57-60 (citing, *inter alia*, *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996); *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1037 (2d Cir. 1984)). Magistrate Judge Baxter also addressed the crime-fraud exception and summarized it as follows:

Neither the attorney-client privilege nor the attorney work-product doctrine protects communications made in furtherance of a crime or fraud. A party seeking to invoke the crime-fraud exception must demonstrate that there is a factual basis for a showing of probable cause to believe that a fraud or crime has been committed – or has been attempted – and that the communications in question were in furtherance of the fraud or the crime. The crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud. Instead the client communication or attorney work product in question must itself be in furtherance of the crime or the fraud.

Dkt. No. 143, p. 76 (internal quotation marks and ellipses omitted).

Regarding Munich Re’s assertion of the crime-fraud exception, Magistrate Judge Baxter concluded that:

Based on the background of this case and my review of the disputed documents, Munich Re has not established probable cause to believe that Utica Mutual perpetrated or attempted to perpetrate fraud in connection with its settlement with

Goulds and the subsequent allocation of related liabilities to its reinsurers, including Munich Re.

While many of Utica's positions in this litigation are subject to fierce debate and could ultimately be resolved against it, Munich Re has not adequately supported its characterization of Utica's conduct as fraudulent.

Munich Re's invocation of the crime fraud exception relies heavily on several assumptions.

First, that Utica Mutual's position that all of its primary policies with Goulds Pump had aggregate limits was fraudulent;

Second, that it was completely improper for Utica Mutual to consider reinsurance implications during settlement negotiations with Goulds;

And, third, that the settlement agreement with Goulds was collusive and fraudulent and designed to shift liabilities to reinsurers beyond the limits of the facultative certificates.

While it became clear that several of Utica's primary policies with Goulds in the late 1970s and early 1980s had blanks in the aggregate limit sections, Utica took the position that particular aggregate limits, like those in the policies for other years, were always intended by the parties.

Utica asserts that at least one court, litigating disputes between Goulds and other insurers, concluded, after a multi-day trial, that the 1977 to 1982 Utica primary policies were subject to aggregate limits . . . .

So, Munich Re's position that Utica's settlement with Goulds was fraudulent because it stipulated that all primary policies had aggregate limits is not persuasive.

As discussed earlier, Munich Re's suggestion that it was inherently improper for Utica Mutual to consider reinsurance consequences during the settlement negotiations with Goulds is not supported by the case law. While Munich Re might ultimately prevail in its challenge to Utica's settlement with Goulds and the subsequent allocation of liabilities to Munich Re, it has not supported its claim that Utica's consideration of the reinsurance implication of the settlement constituted fraud.

Munich Re's claim that Utica and Goulds collusively and fraudulently obtained self-serving mediator findings is belied by the fact that the stipulation between the

parties was endorsed by the judges in California and New York who handled the related litigation.

The stipulation/order included a finding that the various contentious issues addressed by the settlement and “the allocation methodology for indemnity costs and defense costs” were “fair, just and reasonable” and were “resolved within the terms of primary policies” between Utica Mutual and Goulds “at arm’s length and in good faith by the parties. . . .”

While that stipulation and order is not dispositive in this case, it certainly undercuts Munich Re’s assertion of fraud with respect to the settlement and the subsequent findings. I would also note that [United States District Judge Gary L. Sharpe’s] very recent decision in [*Utica Mut. Ins. Co. v. Clearwater Ins. Co.*, No. 6:13-cv-1178 (GLS/TWD), 2016 WL 254770 (N.D.N.Y. Jan. 20, 2016)] confirms my conclusion that Utica’s conduct in connection with the settlement with Goulds was not in bad faith and would clearly, under those circumstances, not come under the crime fraud exception.

Dkt. No. 143, pp. 76-79. With respect to Document 125, Magistrate Judge Baxter found that:

While some of the redacted notes reflect what Munich Re views as the most controversial aspects of the application of the Goulds settlement to Utica’s reinsurers, I do not find that the comments and the advice of Utica’s outside counsel establish the probable cause necessary to trigger the crime fraud exception. The attorney-client and work product opinion privileges would apply.

*Id.* at 97. The following day, Magistrate Judge Baxter issued an order denying Munich Re’s motion to compel disclosure of Document 125. Dkt. No. 138.

On April 11, 2016, Munich Re filed a letter brief concerning outstanding discovery issues. Dkt. No. 156. In it, Munich Re requested that Magistrate Judge Baxter reconsider its motion to compel production of Document 125, and argued that:

Utica redacted [Document 125] . . . presumably because it knew the identity of the document’s author. However, [during the March 29, 2016 deposition of a Rivkin Radler attorney, the attorney] denied that the handwriting was his or that of his partner . . . . A week ago, [Munich Re] requested that Utica identify the handwriting on this document. Utica responded on April 7th that it was looking into the author . . . and handwriting and ‘hope[d] to get back’ to [Munich Re] that day. However, Utica, still has not provided a clear answer. This is troublesome



because Utica should have known the identity of the author at the time it listed the document on the log.

Dkt. No. 162, p. 4, n.10. Utica responded via letter brief and argued that there was no basis for revisiting the conclusion that Document 125 was privileged: “The court found it was privileged after reviewing the document *in camera*. And, the document contains a Rivkin attorney’s handwriting, as Utica informed Munich Re.” Dkt. No. 166, p. 4, n.3.

On April 21, 2016, after performing a second *ex parte, in camera* review of Document 125, Magistrate Judge Baxter held a discovery hearing. Dkt. No. 180, p. 60. At the hearing, Munich Re argued that based on the depositions it had taken, it had concluded that the notes redacted from Document 125:

were notes taken either during a discussion which immediately preceded a mediation in December of 2005 or notes which were taken at the meeting in December of 2005 itself.

The redacted words appear on documents—form documents that were prepared by the Rivkin Radler law firm . . . . [T]he senior partner . . . [and] his close second, both denied that the document contained their handwriting.

Dkt. No. 180, p. 65. Munich Re further stated that it believed that the “Court was informed by Utica’s counsel in a letter dated October 27, 2015, that the redacted note was authored by a Rivkin Radler attorney” and that although Utica recently indicated that the notes were authored by Rivkin Radler attorney Robert Aurigema,<sup>4</sup> Munich Re believed “that he was recording something that was being said, not something that he himself said.” *Id.* at pp. 66-67. Utica responded that “the note . . . this document, came from Rivkin Radler’s files that had the

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<sup>4</sup> At his recent deposition, Aurigema testified that he authored the notes. Dkt. No. 185-4. Although Utica submitted the transcript in opposition to Munich Re’s appeal, the Court has not considered it, or any other evidence that was not before Magistrate Judge Baxter in deciding the present appeal.

attorney's other notes. We never were able to confirm which specific attorney authored the [notes] but that is not a necessary component . . . for the privilege claim, given the context of where it was produced from." *Id.* at pp. 69-70.

After reviewing the standard applicable to a motion for reconsideration, Magistrate Judge Baxter made the following findings:

So with respect to document number 125 on the privilege log . . . the specific identity of the Rivkin attorney who authored the notes that I found privileged was not provided on the privilege log.

The fact that Mr. Savino testified that the handwriting was not his or that of his partner's, Stephen Smirti, does not rule out that they were authored by another Rivkin attorney, at least four<sup>5</sup> of whom were referenced at various places on Utica's privilege log.

In any event, as the transcript of the January 20th, 2016, discovery conference . . . indicates, I found that the contents of the notes clearly establish that this was a notation by a lawyer for Utica relating to the reinsurance implications of Goulds settlement. So, any lingering confusion as to which lawyer wrote the notations does not change my conclusion that Utica appropriately invoked the privilege with respect to the notations.

Now, with respect to what I think is essentially the crime fraud exception, I discussed that at some length during the January 20th, 2016, conference. I think I noted, and I guess if you've seen the document inadvertently, this was no surprise to you, that this was information that I'm sure you would very much like to have. But I agree with [counsel for Utica], that, unless there is evidence of ongoing fraud that is facilitated by the communication, the privilege does not get overcome just because you want the document.

And, you know, while I understand your position as to what Utica has done here with respect to the allocation of these exchanges between the primary and the underlying policies and its effort to stick it to the reinsurers, to ineloquently summarize your position, you know, I do not feel, particularly in light of, among

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<sup>5</sup> Munich Re asserts that only two of the individuals Magistrate Judge Baxter referenced were attorneys and has provided evidence in support of its assertion. Dkt. No. 177-1, p. 14, n.15. The evidence, however, does not provide a basis for concluding that Magistrate Judge Baxter's finding that the notes were authored by a Rivkin Radler attorney was clearly erroneous.

other things, Judge Sharpe's opinion in the Clearwater case, that that's indicative of a fraud and for the reasons that I stated, in greater at January 20th, of this year.

Dkt. No. 180, pp. 70-72; Dkt. No. 175 (Order entered on April 25, 2016 denying Munich Re's motion for reconsideration). On May 6, 2016, Munich Re filed the instant appeal. Dkt. No. 177.

Munich Re argues that given the uncertainty about who authored the notes on Document 125, Magistrate Judge Baxter's finding that Utica established that Document 125 contains privileged material was clearly erroneous. It is well established that "the burden is on a party claiming the protection of a privilege to establish those facts that are the essential elements of the privileged relationship." *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (quoting *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 224 (2d Cir. 1984)). Magistrate Judge Baxter, however, concluded that the identity of the attorney was irrelevant because "the contents of the notes clearly establish that this was a notation by a lawyer for Utica relating to the reinsurance implications of Goulds settlement." Dkt. No. 180, p. 71. Having reviewed Document 125, the Court finds no basis for concluding that Magistrate Judge Baxter's privilege determination was clearly erroneous or contrary to law.

Munich Re asserts that Magistrate Judge Baxter "misunderstood what [Munich Re] is alleging to be the fraud in which Utica engaged," and therefore erroneously concluded that the crime-fraud exception did not apply. Dkt. No. 177-1, p. 18. Magistrate Judge Baxter heard extensive oral argument on two occasions and received numerous submissions from both parties. The Court has reviewed Magistrate Judge Baxter's discussion of Munich Re's arguments as well as his thorough discussion and analysis of the crime-fraud exception and concludes that his finding that the crime-fraud exception did not apply was neither clearly erroneous nor contrary to law.

Upon review of the record, the Court concludes that Magistrate Judge Baxter's denial of Munich Re's motion for reconsideration was well within his discretion, and that there is no basis to find that the ruling is clearly erroneous or contrary to law.

**IV. CONCLUSION**

According, it is

**ORDERED** that the April 25, 2016 Order (6:12-cv-196, Dkt. No. 175) (6:13-cv-743; Dkt. 129) is **AFFIRMED**; and it is further

**ORDERED** that Munich Re's appeal (6:12-cv-196, Dkt. Nos. 177, 274) (6:13-cv-743, Dkt. Nos. 131, 215) is **DENIED**.

**IT IS SO ORDERED.**

Dated: January 13, 2017



**Brenda K. Sannes**  
U.S. District Judge